of a court of equity. On the other hand, it is conceivable that a court of equity might, in its discretion, deny this relief, as the sacrifice involved in the sale of a contingent interest may be unconscionable.[25]

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VALUATION OF WATER RIGHT AND FRANCHISE AS BASIS FOR DETERMINING IRRIGATION RATES. — The law is now settled by decision,[1] or by statute,[2] that a company engaged in distributing water for irrigation is in the public service. Not only must it supply all who apply properly,[3] but the rates must be reasonable and are subject to public regulation.[4] The basis generally approved for determining the rates is a fair return on the present value of the property used in the business.[5] A recent case decides that water rights are rights of the consumer attached to his land and not property upon which the irrigation company is entitled to an income, but that the company's franchise is to be valued as a basis for returns. *San Joaquin & Kings River Canal & Irrigation Co.* v. *County of Stanislaus*, Circ. Ct., N. D. Cal. The case involves the western doctrine of prior appropriation, under which the first taker of water obtains a vested right in it.[6] Appropriation by an irrigation company not owning land has led to conflicting theories regarding the basis of the right. The weight of authority is that the user is the appropriator, and the company, though in the public service, is the agent of the landowner.[7] Such reasoning is unsatisfactory. The requisites for appropriation being diversion, and application to a beneficial use within a reasonable time,[8] it would seem that the company which diverts the water and applies it to lands other than its own meets the requirements. The company may change the point of diversion, the place of use, and may sell the right apart from the land.[9] The water right is a property right,[10] but the fiction that it belongs to the consumer need not be resorted to in order to reach the conclusion of the court in the principal case. Whatever theory be taken, the right is not one upon which a return would be justified. Undoubtedly it depends upon the consumer for its continuance;[11] so to charge for it is to charge for doing what the consumer allows; it is to require payment for the very right on which

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[25] In Jacob, Jr. *v.* Howard, *supra*, the decree was, that only a small portion of the estate be sold, as a sacrifice was to be avoided, if possible. The Massachusetts court has allowed equitable execution on a remainder subject to a single contingency, but refused to do so as to an interest subject to a double contingency. Clarke *v.* Fay, 205 Mass. 228, 91 N. E. 328. In Howbert *v.* Cauthorn, *supra*, the court said, "It would be a speculative transaction, and ruinous in its consequences, not only to creditors, but to all parties interested."

[1] Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 17 Sup. Ct. 56.
[2] See, for example, CAL. STAT., 1885, 95.
[3] San Diego Land & Town Co. *v.* Sharp, 97 Fed. 394.
[4] Salt River Valley Canal Co. *v.* Nelssen, 10 Ariz. 9, 85 Pac. 117.
[5] San Diego Land & Town Co. *v.* National City, 174 U. S. 739, 19 Sup. Ct. 804.
[6] Atchison *v.* Peterson, 20 Wall. (U. S.) 507.
[7] Gould *v.* Maricopa Canal Co., 8 Ariz. 429, 76 Pac. 598.
[8] See Combs *v.* Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966, 967.
[9] Strickler *v.* City of Colorado Springs, 16 Colo. 61, 26 Pac. 313.
[10] See Cash *v.* Thornton, 3 Colo. App. 475, 34 Pac. 268, 269.
[11] New Merger Ditch Co. *v.* Armstrong, 21 Colo. 357, 40 Pac. 989.

the ability to do business is predicated. To allow a street railway to charge for its right to use its tracks would be as permissible. Attempts by irrigation companies to collect for water rights in addition to the fee for distributing have been held invalid.[12] If such charges could not be made, certainly a valuation of such water right could not be added to the value of the property to increase the rates. Of course where the company has paid for the acquisition of water rights, a different result should follow.

On principle, the value of a franchise should not be a basis for determining rates. A franchise has value only in proportion to its capacity to earn profits; it increases in value with the earnings. If a high rate would be justified on account of the great value of the franchise, this fact would in turn enhance the value of the franchise itself and justify a still higher charge.[13] The principal case is the first square decision on this point, but seems opposed to previous judicial intimations.[14] There is a clear distinction between allowing for the value of a franchise where a plant is sold or taken by eminent domain, and allowing for it as a basis of rates. All courts allow for it in the former case,[15] as well as where the company has paid for the franchise.[16] A franchise has value for such purposes, but a company continuing in business would hardly add its value to the capital stock in estimating the annual income on its property.[17] If the value of the water right cannot be counted because that allows a charge for a value really contributed by the consumer, it seems inconsistent to allow for the franchise, really contributed by the public.

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INTERPLEADER IN TAX CASES. — In New York a taxpayer who is about to be forced to pay taxes assessed on the same property in two towns may maintain a bill of interpleader against the towns or their tax collectors.[1] Such a bill is not allowed in Rhode Island [2] nor in Massachusetts.[3] A recent Massachusetts case gives two reasons for denying the relief. *Welch* v. *City of Boston*, 94 N. E. 271 (Mass.). The first is that the requirements for a bill of interpleader are not satisfied, in that there is no "privity" between the claimants, and that, as the amount of the taxes is different, the plaintiff is not impartial. These objections are merely technical.[4] The substantial reason given is that the relief would require

[12] Wheeler *v.* Northern Colorado Irrigating Co., 10 Colo. 582, 17 Pac. 487; San Diego Land & Town Co. *v.* National City, *supra.*

[13] See WYMAN, PUBLIC SERVICE CORPORATIONS, § 1104.

[14] See Brunswick & Topsham Water District *v.* Maine Water Co., 99 Me. 371, 375–380, 59 Atl. 537, 538–541. The United States Supreme Court has held that a company is entitled to an income on the amount actually paid for a franchise, but not upon the amount which that franchise has since increased in value. Willcox *v.* Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192.

[15] Brunswick & Topsham Water District *v.* Maine Water Co., *supra.*

[16] Willcox *v.* Consolidated Gas Co., *supra.*

[17] *Cf.* Cedar Rapids Water Co. *v.* Cedar Rapids, 118 Ia. 234, 263, 91 N. W. 1081, 1091.

[1] Thompson *v.* Ebbet, Hopk. Ch. (N. Y.) 272; Dorn *v.* Fox, 61 N. Y. 264.

[2] Greene *v.* Mumford, 4 R. I. 313.

[3] Macy *v.* Inhabitants of Nantucket, 121 Mass. 351.

[4] See 17 HARV. L. REV. 489; 22 *id.* 294.